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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
Grace Gilchrist Knie, Circuit Court Judge

Opinion No. 2025-UP-422 (S.C. Ct. App. filed December 23, 2025)

Appellate Case No. 2026-00456

The State,

Respondent,

v.

Donald King Pollock,

Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S STATEMENT OF ISSUE ON CERTIORARI

In its "Statement of Issue on Certiorari" the state, as Respondent, articulates a different statement of the question presented by the Petition for Writ of Certiorari (hereafter, "Petition"), culminating in the question: "Was this a race-neutral explanation, and was the trial court's finding that the explanation was pretextual clearly erroneous?" *See* Return to Petition for Writ of Certiorari (hereafter, "Return"), p. 1. Petitioner disagrees with the state's statement of the issue.[1] The issue is the circuit court's erroneous ruling on a ***gender-based Batson***[2] challenge by the state to one of the defense's peremptory juror challenges, the strike of juror 82, and the Court of Appeals' affirmance of the circuit court's ruling.

In the Court of Appeals and again in its Return in this Court, the state has mischaracterized what transpired in the lower court in an apparent effort to avoid reversal of an erroneous gender-based *Batson* ruling by the lower court. The lower court did ***not*** address race or rule that the reason for the strike of juror 82 by the defense was not race neutral, and the lower court did ***not*** rule the reason given by the defense for the strike was a pretext for racial discrimination. Because the state continues to claim such rulings were made, this Reply addresses whether the juror strike was for a race-neutral reason, *infra* pp. 10-12, and whether the defense engaged in purposeful racial discrimination, *infra* pp. 14-15. The defense did not improperly strike juror 82, either on the basis of her gender or her race. Both the lower court and the Court of Appeals erred in their analysis of the state's gender-based objection to the strike of juror 82.

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[1] Petitioner also disputes a factual assertion in the "Statement of Issue on Certiorari." Defense counsel did articulate the factual basis for his questioning the juror's understanding of English – his own perception and impression based on his observations of the juror during the initial qualification of the jury. *See* R. p. 121, lines 4-8.

[2] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

In the statement of the case contained in its Return, the state cites pages of the transcript containing the prosecution's opening argument and certain trial testimony. *See* Return, p. 2. The defense disputed the trial testimony of the complaining witness and contended the witness's story was fabricated as part of an attempt by the witness's mother to exit her marriage to Petitioner, while concealing an extra-marital affair and financial improprieties she had committed during the marriage. R. pp. 167-70. The ***only*** issue in this appeal pertains to a *Batson* ruling during jury selection. The passages of argument and witness testimony cited by the state are neither relevant nor material to the question presented by the Petition. The Court should not give any consideration to trial testimony and prosecution argument, instead confining its review to what transpired during jury selection, counsel's argument, and the court's ruling on the *Batson* objection. R. pp. 104-11, 116-28, 134-38.

REPLY TO RESPONDENT'S STATEMENT OF STANDARD OF REVIEW

The state's Return correctly articulates the two applicable standards of review in this matter: (1) *de novo* (plenary) review with respect to the question whether the trial court followed the mandated *Batson* procedure; and (2) a clearly erroneous standard with respect to the trial court's ultimate determination of the validity of the peremptory strike. *See State v. Cochran*, 369 S.C. 308, 312-13, 631 S.E.2d 294, 297 (Ct.App. 2006). The state cites *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994), in which this Court stated, "[t]he trial court's findings regarding purposeful discrimination are accorded great deference and are to be set aside only if clearly erroneous." *See Dyar*, 317 S.C. at 79, 452 S.E.2d at 604. However, the state omits the next, very important, sentence of the *Dyar* discussion of appellate review of a *Batson* determination, in which this Court emphasized: "The composition of the jury is a relevant consideration." *See id.*

Throughout this appeal, Petitioner has relied upon case precedents establishing the question of purposeful discrimination is evaluated on the basis of the totality of the facts and circumstances, with a relevant factor in the analysis being consideration of the selection and composition of the jury. Petition, p. 4; Final Brief of Appellant, p. 3. Petitioner previously addressed this aspect of a *Batson* analysis – the composition of the jury selected – and spelled out why the defense's juror strikes and the composition of the first jury selected in this case demonstrate the defense did not engage in purposeful gender discrimination in the exercise of its peremptory challenges. Petition, pp. 11-12; Final Brief of Appellant, p. 10. Because of the state's mischaracterization of the issue as race-based, Petitioner has also demonstrated that the defense did not engage in purposeful racial or ethnic discrimination. *See infra* pp. 14-15; Final Reply Brief of Appellant, pp. 15-16.

The state has never refuted these aspects of Petitioner's argument – either in its brief filed in the Court of Appeals or in its Return filed in this Court. In fact, the state does not address this key part of the analysis – the composition of the selected jury – at all. In affirming the lower court's decision, the Court of Appeals failed to conduct this important facet of appellate review of a *Batson* ruling. When this Court considers the totality of the circumstances and the composition of the jury, as required in a proper *Batson* analysis, it will be apparent that there was neither gender-based nor race-based discrimination in the strike of juror 82 and that certiorari review of the Court of Appeals' decision is warranted.

REPLY ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING A GENDER-BASED *BATSON* VIOLATION WITH RESPECT TO ONE OF THE DEFENSE'S PEREMPTORY JUROR CHALLENGES, AND THE COURT OF APPEALS ALSO ERRED IN AFFIRMING THE TRIAL COURT'S *BATSON* RULING.

Petitioner challenges the lower court's ruling – both its failure to conduct the mandated three-step *Batson* analysis and its finding of pretext concerning gender in the strike of juror 82.

Petitioner also challenges the Court of Appeals' determination that the lower court followed the correct *Batson* procedure and its affirmance of the lower court's finding of pretext as to gender.

As an initial matter, two procedural points must be addressed. First, the Court of Appeals agreed with Petitioner and determined, at step two of the *Batson* analysis, that the reason for the strike – counsel's concern about the juror's comprehension of English – was gender neutral. The state did not seek rehearing of this finding in the Court of Appeals, and the state did not seek certiorari review of this finding in the Supreme Court. This unappealed finding is now the law of the case. *See Isaac v. Onions*, 445 S.C. 525, 537, 915 S.E.2d 492, 498 (2025); *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174-75, 525 S.E.2d 869, 871 (2000). The state cannot argue, as it appears to do in its Return, that the defense's stated reason for the strike of juror 82 was not gender neutral.

Second, the state asserts, as it did in the Court of Appeals, that the procedural aspect of Petitioner's argument is not preserved, citing *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005), and the contemporaneous objection rule. In *Johnson*, this Court found an evidentiary objection was not preserved because the ground argued on appeal was different than the ground argued in the lower court. *See Johnson*, 363 S.C. at 58, 609 S.E.2d at 523. The ruling in *Johnson* is not applicable to appellate review of a trial court's analysis of a *Batson* objection to a peremptory juror strike. Rather, when a party invokes *Batson*, the three-step process established by the United States Supreme Court and adopted by this Court in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds, State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014), must be followed to determine if the opposing party unconstitutionally engaged in purposeful discrimination. *See State v. Inman*, 409 S.C. 19, 28, 760 S.E.2d 105, 109 (2014); *Cochran*, 369 S.C. at 312-13, 318-23, 631 S.E.2d at 297, 300-03. At the second step of that process, where the burden rested upon

the defense, it met its burden by articulating a gender-neutral reason for its strike of juror 82. At the third step, the burden returned to the state to show the reason offered was mere pretext to engage in purposeful discrimination. *See Cochran*, 369 S.C. at 315, 322, 631 S.E.2d at 298, 302. The court erred in failing to require the state to make any showing at the third stage of the *Batson* procedure before ruling that a *Batson* violation was committed. The contemporaneous objection rule is inapplicable in this context, and nothing more was required of the defense to preserve all aspects of the *Batson* issue raised in this appeal.

Turning to the substance of the state's arguments, the state maintains, as it did in the Court of Appeals, that when the *Batson* challenge was made, the defense was required to give ***both*** a race-neutral and a gender-neutral reason for its strike. Return, pp. 6, 9-10; *see also* Final Brief of Respondent, pp. 4, 9. This is an incorrect statement of the proper analysis. Further, the state asserts the trial court "concluded the defense failed to offer a non-pretextual race- and gender-neutral justification" for its strike. Return, p. 7; *see also* Final Brief of Respondent, p. 6. This is an incorrect statement of what the trial court ruled.

In this case, the basis of the state's objection was that the defense improperly struck eight women, *see* R. pp. 116-17, 119, and the ensuing argument and analysis were premised on the gender-based nature of the state's objection. The many *Batson* decisions of our appellate courts demonstrate that the only response required of the party who exercised the challenged juror strike is to state a reason that is neutral with respect to the ground – whether gender or race – upon which the *Batson* challenge is made. When the challenge is race-based, the party who struck the juror must give a race-neutral reason. *See, e.g., Inman*, 409 S.C. at 26, 760 S.E.2d at 108. When the challenge is gender-based, the striking party must give a gender-neutral reason. *See, e.g., State v. Rayfield*, 369 S.C. 106, 112-13, 631 S.E.2d 244, 247-48 (2006), *abrogated on other grounds, State*

v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Our appellate *Batson* decisions have never required that a neutral reason be given with respect to an improper purpose not raised by the objecting party. The state did not object on the ground of purposeful racial discrimination, and the argument of the attorneys and the ruling of the court were not made on that ground. The state's objection was that the defense's strikes were gender-based, and the court's ruling was that the reasons given for the strikes of jurors 82 and 118 "were a pretext concerning gender." R. p. 117, lines 4-5; p. 119, lines 10-13; p. 127, line 18 – p. 128, line 1.

The state also mischaracterizes what actually occurred during the *Batson* proceedings, stating, "the trial court followed the correct Batson procedure, requiring Pollock to provide a race-neutral and gender-neutral explanation for his strike . . . ." and further stating, "[t]he trial court correctly quashed the jury because Pollock failed to provide a race-neutral justification for the strike . . . ." Return, p. 4; *see also* Return, p. 7. This mischaracterization is repeated, with the assertion that "the court heard argument from both sides . . . and concluded the defense failed to offer a non-pretextual race- and gender-neutral justification for striking Juror Kul." Return, p. 7. Contrary to these statements, the court did ***not*** require counsel to articulate a race-neutral reason and did ***not*** find a *Batson* violation on the basis of a failure to provide a race-neutral justification. The objection, the argument, and the court's ruling were gender based, as summarized in the paragraph below, with citations to the transcript.

When defense counsel stated that its reason for striking juror 82 was the juror's understanding of the English language, the prosecutor briefly interjected "that would be a race based strike." R. p. 121, lines 11-12. Notwithstanding this remark, however, in the same passage the prosecutor adhered to the gender-based argument, stating, "The State's position is that is not a

gender neutral strike."[3] R. p. 121, lines 15-16. The defense then stated, "that's not a race-based strike, that's a knowledge strike." R. p. 121, lines 17-18. No further mention of race was made – not by the state, not by the defense, and not by the court. Over the lengthy remaining argument, both attorneys addressed whether the stated reasons for the challenged strikes were gender neutral, and the court's ruling was grounded on the gender-based nature of the objection. R. p. 124, lines 22-23 (prosecutor); p. 125, lines 5-9 (prosecutor); p. 126, lines 1-3 (defense attorney); p. 126, lines 4-6 (defense attorney); p. 126, lines 18-20 (prosecutor); p. 127, line 18 – p. 128, line 1 (court).

Despite the brief interjection that the strike was race based, the clear ground of the state's objection was gender, as stated immediately after the brief remark and as repeated continuously during the ensuing argument. Both attorneys argued the question whether the stated reasons for the strikes were gender neutral, and the court based its ruling on "a pretext concerning gender." The state's attempt at the appellate level to recast the strike of juror 82 as impermissibly race-based cannot be harmonized with the record of the proceedings, as documented by the transcript.

In setting out the framework for analysis of a *Batson* objection, the state quotes a passage from *State v. Rogers*, 405 S.C. 520, 525, 748 S.E.2d 247, 250 (Ct.App. 2013), and *Purkett v. Elam*, 514 U.S. 765, 767 (1995). The passage quoted by the state gives an incomplete picture of what occurs at step three of a *Batson* analysis, leaving the impression that no burden rests on the objecting party at that juncture but instead the trial court merely rules. In fact, more is required. As *Rogers* further explained,

> "At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." . . . "The burden of persuading the court that a *Batson* violation

[3] Respondent has repeatedly claimed, incorrectly, "the State argued Pollock's strike of Juror Kul violated Batson because it was not race-neutral . . . ." Return, p. 5; *see also* Final Brief of Respondent, p. 5. The state did ***not*** argue the strike was not race neutral, instead stating, "The State's position is that is not a gender neutral strike." R. p. 121, lines 15-16.

> has occurred remains at all times on the opponent of the strike." . . . "This burden is generally established by showing similarly situated members of another race were seated on the jury." . . . "Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." . . . "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo."

See Rogers, 405 S.C. at 526, 748 S.E.2d at 250-51 (citations to South Carolina Supreme Court and Court of Appeals decisions omitted).

As it did in the Court of Appeals, the state contends the prosecutor responded to the defense's explanation by arguing the explanation was pretextual. Return, p. 6; Final Brief of Respondent, p. 6. In fact, the state ***did not ever*** assert a claim of pretext. The state's position was that the articulated reason for the strike of the juror was not gender neutral. R. p. 121, line 16; p. 124, lines 22-23. When the reason was given, the prosecutor opined the juror did not appear to have any issues with understanding or answering questions, and the prosecutor referenced the court's earlier inquiry as to the jurors' understanding English. R. p. 121, lines 12-15; p. 124, line 25 – p. 125, line 2. However, the prosecutor ***did not contend*** the reason given was fundamentally implausible and ***did not make any argument or showing*** that counsel's concern about the juror's understanding of the language was mere pretext. The state ***did not argue or demonstrate*** that another similarly situated male juror was seated. And the state ***did not argue*** that the jury as selected demonstrated purposeful discrimination.[4] Step three of the process simply ***was not conducted***. Instead, the court ruled immediately following the attorneys' arguments with respect

[4] In fact, the jury selection process and the composition of the selected jury refute any claim of purposeful gender discrimination, as explained in detail in the Petition, pp. 11-12. With respect to the new race-based challenge argued by the state on appeal, the selection process and the composition of the selected jury also refute any claim of purposeful racial or ethnic discrimination, as explained in this Reply, *infra* pp. 14-15.

to gender neutrality, ***without requiring any showing as to pretext or purposeful discrimination***. This is the exact error recognized in *Inman* and *Cochran*, as more fully discussed in the Petition, pp. 7-9.

To the extent the prosecutor disagreed with the defense's perception that the juror may not have had a good understanding of the English language, that disagreement does not alter the gender-neutral nature of the defense's reason for the strike. As noted above, the Court of Appeals determined the stated reason was gender-neutral, a finding that the state did not appeal. Contrary to the state's arguments, the defense was not required to make an evidentiary showing that the juror in fact had a less-than-perfect understanding of the English language. In *Cochran*, the defense asserted it struck one juror, juror 63, because she had the same last name as a local deputy sheriff. The state countered that neither the defendants nor their counsel knew for sure whether that juror was related to the deputy with the same last name. The appellate court did not hold the defense was required to establish a relationship between the juror and the deputy. Rather, the appellate court found error in the trial court's finding of pretext, stating the reason for striking the juror was race-neutral and the state failed to carry its burden of proving purposeful discrimination. *See Cochran*, 369 S.C. at 316, 631 S.E.2d at 299.

Similarly, here, although the prosecutor had a different impression of the juror's ability to understand English, her differing perception does not alter the gender-neutral nature of the explanation and does not establish purposeful discrimination. The trial court made no finding as to the juror's ability to understand English and made no finding that defense counsel's impression and stated concern about the juror's understanding of the language was not credible. Rather, the court merely concluded the stated reason was pretext, without requiring the state to meet its burden of proving purposeful discrimination. As with juror 63 in *Cochran*, this ruling was error. *Id.*

Contrary to the state's assertions in the Court of Appeals and its Return in this Court, the lower court did ***not*** rule the stated reason for striking the juror was not gender neutral and did ***not*** rule the reason was not race neutral. Had it done so, the ruling would have been clearly erroneous, because the question of a juror's understanding of the language is both gender- and race-neutral, applying with equal force to jurors of either gender and to jurors of any race. *See State v. Wright*, 354 S.C. 48, 55-56, 579 S.E.2d 538, 542 (Ct.App. 2003) (solicitor's uncertainty as to juror's command of English language was race-neutral consideration), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

The state claims defense counsel failed to articulate a basis for the reason given for its strike of juror 82 and further claims counsel "admitted" there was no reason to believe the juror had any difficulty understanding English. This is a mischaracterization of what counsel said. Counsel explained that during the initial juror qualification, counsel "thought it seemed as if English maybe was not the juror's first language," and counsel "thought there might be a little discrepancy on what she could understand." R. p. 121, lines 4-8. Counsel's impression was clearly premised on his own observations and perceptions of the juror during the initial qualification. Moreover, what the state characterizes as an "admission" that the juror could understand the English language was expressly qualified by counsel's stated concern that she would have difficulty with the language (*i.e.*, legal terminology) that would be used during arguments to the jury. R. p. 125, lines 11-15.

An attorney's perception of a juror's ability to understand the language is a proper race-neutral basis for a peremptory challenge. *See Wright*, 354 S.C. at 55-56, 579 S.E.2d at 542. And a juror's demeanor is an appropriate basis for a challenge based on concern about the juror's communication and comprehension skills. *See State v. Guess*, 318 S.C. 269, 271, 273, 457 S.E.2d

6, 7, 8 (Ct.App. 1995) (solicitor "felt like" juror "was a little slow" . . . "my initial impression of him was that he really didn't have a good grasp of what was going on . . ."). Here, as in *Guess*, counsel's concern was based on what he observed in the qualification of the jurors, and counsel's observations and perceptions of the juror are a legitimate and proper basis for a strike. In other contexts, our courts have upheld explanations premised on what an attorney perceived about a juror based on the juror's appearance and demeanor. *See, e.g., State v. Stewart*, 413 S.C. 308, 315-17, 775 S.E.2d 416, 420 (Ct.App. 2015) (juror was late and appeared disinterested); *Rayfield*, 369 S.C. at 113, 631 S.E.2d at 247-48 (juror had a conservative appearance and was retired).

The state seeks affirmance of the court's *Batson* ruling on the basis of the state's allegation that the strike of juror 82 was improper racial discrimination, a ground not asserted in the lower court. The state speculates counsel's impression as to the juror's understanding of English "must have been based on Kul's name, appearance, or a combination of the two," *see* Return, p. 10, and it argues stereotypes based on ethnicity are not race-neutral. Neither the state's broad racial discrimination argument nor the more specific points of the argument were articulated by the prosecutor in the court below, and the state cannot avail itself of these alternative rationales for a claim of purposeful discrimination on appeal. *See Inman*, 409 S.C. at 28-29, 760 S.E.2d at 109-10; *State v. Evins*, 373 S.C. 404, 417, 645 S.E.2d 904, 910 (2007). In both *Inman* and *Evins*, this Court rejected giving consideration to arguments of pretext raised on appeal but not articulated in the lower court during the *Batson* hearing. In *Inman*, addressing new arguments of pretext crafted by the state as the respondent in a defendant's appeal, the Court explained:

> However, because the State did not raise these arguments during the *Batson* hearing, we find these post hoc justifications untimely. . . . Regardless of their veracity in hindsight, neither explanation helped the State carry its burden of persuasion *at the time of the hearing*, and the circuit court therefore improperly granted the State's *Batson* motion and denied Appellant his right to exercise his peremptory challenges.

See Inman, 409 S.C. at 29, 760 S.E.2d at 110 (emphasis in original) (citation to *Evins* omitted). Similarly, here, the arguments of pretext and purposeful racial discrimination made by the state in its appellate filings but not in the court below cannot form the basis for affirming the circuit court's determination that the strike of juror 82 was a pretext concerning gender. As in *Inman*, the state did not meet its burden in the court below to establish purposeful discrimination, and the lower court erred in granting the *Batson* motion.

The state invokes decisions of other jurisdictions that have no bearing on the present issue. The state cites two cases that did not involve *Batson* challenges at all. Those cases addressed lower court rulings made after it came to light that a juror who had been seated had a language difficulty. In *United States v. Speer*, 30 F.3d 605, 610-11 (5th Cir. 1994), the appellate court upheld a trial judge's decision to excuse a juror and seat an alternate after concerns surfaced about the juror's ability to understand. In *United States v. Campbell*, 544 F.3d 577, 580-83 (5th Cir. 2008), the reviewing court rejected a claim of double jeopardy upon retrial after a mistrial was granted in the first trial, due to the limited ability of a juror to understand English that precluded the juror from meaningfully taking part in deliberations. The state is incorrect in what it claims is the holding of *Campbell*. *Campbell* did not involve a "finding juror's language difficulties were race-neutral justification for strike," as the state asserts. *See* Return, p. 11 (state's parenthetical explanation of citation to *Campbell*). In *Campbell*, the appellate court was ***not*** addressing a juror strike and ***did not*** decide if the reason for a strike was race neutral. These decisions cited by the state are not germane to the *Batson* issue presented in this appeal.

The state cites additional decisions from federal circuits that applied the deferential "clearly erroneous" standard in the context of strikes based on jurors' ability to understand or communicate. However, those cases involved actual findings by the lower court as to the ability of the juror to

comprehend the language or the believability of the party's explanation for the strike, a situation not presented in this case. Those authorities, in addition to being from foreign jurisdictions, do not have any bearing on the situation presented in this appeal. In *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994), the lower court found the government's articulated reason – a concern with whether English was the juror's first language that made the juror the least desirable alternate – was "plausible," even though the court also noted the juror had not exhibited any difficulty speaking or understanding English when questioned. *See Canoy*, 38 F.3d at 898. The circuit court quoted language from *Hernandez v. New York*, 500 U.S. 352, 365 (1991), as to the trial judge's province to determine whether the race-neutral explanation should be believed, and it applied a deferential standard of review to uphold the trial court's finding. *Id.*, 38 F.3d at 899. In this case, unlike *Canoy*, no determination was made by the circuit court as to the plausibility or credibility of counsel's explanation for its strike.

In *United States v. Murillo*, 288 F.3d 1126 (9th Cir. 2002), one of the reasons for a government strike of a juror was its belief the juror had difficulty communicating with counsel during voir dire. *See Murillo*, 288 F.3d at 1135. The district court made a factual finding, agreeing with the government that the juror had difficulty communicating and rejected the *Batson* challenge. *Id.* The appellate court affirmed under the deferential standard of review. *Id.*, 288 F3d at 1136-37. Unlike *Murillo*, the trial judge in this case made no determination as to the actual ability or inability of juror 82 to understand English.

Canoy and *Murillo* simply are not applicable here, where the lower court made no factual findings akin to the findings under review in those cases. The circuit court never addressed and did not make any finding as to the credibility of defense counsel's explanation that he thought there was an issue with the juror's understanding of English. Nor did the circuit court make a

specific finding that juror 82 had an adequate understanding of the English language. There is no finding similar to those addressed in the cases cited by the state with respect to which the appellate court may apply a deferential standard of review. The court did not make any finding whatsoever as to the credibility of counsel's explanation or as to the language comprehension of juror 82. Rather, the court summarily concluded the defense's explanation was a pretext concerning gender.

If this Court entertains the argument crafted by the state at the appellate level as to purposeful racial discrimination in the defense's strike of juror 82, notwithstanding the state's failure to put forth such a *Batson* challenge in the court below, the Court must evaluate that argument in light of the totality of the facts and circumstances, including the selection and composition of the jury. *See State v. Shuler*, 344 S.C. 604, 615, 621, 545 S.E.2d 805, 810, 813 (2001); *Dyar*, 317 S.C. at 79, 452 S.E.2d at 604; *Rogers*, 405 S.C. 520, 534-35, 748 S.E.2d 247, 255 (Ct.App. 2013). The totality of the facts and circumstances – including the defense's strikes and the racial composition of the first jury selected – refutes the state's claim that the defense was engaged in purposeful racial discrimination.

Juror 82 was a white female. R. p. 106, lines 1-2; p. 120, lines 22-24. The first jury selected was composed of eight whites (jurors 107, 43, 5, 32, 45, 26, 33, and 76), two Asians (jurors 66 and 4), and two blacks (jurors 135 and 87). R. pp. 104-10. Two alternates were chosen, a Hispanic (juror 10) and a white (juror 21). R. p. 110. As to the jury itself, the defense seated seven white jurors while it still had strikes available (107, 43, 5, 32, 45, 26, and 33), and it struck six white jurors (149, 82, 58, 139, 85, and 118), including juror 82. R. pp. 105-09. Its other four strikes were exercised against one Hispanic (juror 120) and three black (jurors 111, 90, and 17) jurors. R. pp. 104, 107-09. As to the alternates, the defense did not exercise a strike, seating both a Hispanic (juror 10) and a white (juror 21) alternate. R. p. 110. In the context of the actual exercise of the

defense's peremptory challenges and the composition of the actual jury selected, the state's newly articulated race-based *Batson* argument with respect to a single white juror, juror 82, is baseless.

To the extent the state's newly crafted challenge to the strike of this juror is premised on ethnicity, the record is completely devoid of information concerning her ethnicity. The state's *Batson* motion in the lower court was not a claim that the defense engaged in purposeful discrimination on the basis of the juror's ethnicity, and no record was created on that question. However, the composition of the jury selected rebuts the state's new argument and clearly demonstrates the defense did not engage in purposeful racial or ethnic discrimination, seating individuals who were white, black, Asian, and Hispanic to serve as jurors or alternates. Viewing the totality of the facts and circumstances, there is simply no basis for a finding that the strike of juror 82 was the product of purposeful racial or ethnic discrimination.

CONCLUSION

The Court of Appeals erred in affirming the lower court's *Batson* ruling. This Court should grant a writ of certiorari, reverse, and grant petitioner a new trial.

Respectfully submitted,

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